Supreme Court, U.S.
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NO. 951817

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JANETTE M. WIFE OF/AND CHARLIE KORNMAN, INDIVIDUALLY AND ON BEHALF OF THEIR DEPENDENT SON, RICHARD JAY KORNMAN

VERSUS

BLUE CROSS/BLUE SHIELD OF LOUISIANA

SUPPLEMENTAL APPENDIX

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APPENDIX F

STATE OF LOUISIANA

COURT OF APPEAL

FIFTH CIRCUIT

DOCKET NO. 94-CA-00306

JANETTE M. wife of/and CHARLIE KORNMAN,
Individually
and on behalf of their dependent son,
RICHARD JAY KORNMAN
Plaintiffs-Appellees

VERSUS

BLUE CROSS/BLUE SHIELD OF LOUISIANA
Defendant-Appellant

Appeal from the Twenty-Fourth Judicial District
Court, Parish of Jefferson, State of Louisiana,
Docket No. 364,688, Div. "E",
the Hon. Clarence E. McManus, Presiding

ORIGINAL BRIEF ON BEHALF OF
DEFENDANT/APPELLANT,
LOUISIANA HEALTH SERVICE &
INDEMNITY COMPANY
BLUE CROSS/BLUE SHIELD OF LOUISIANA

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* * *

ASSIGNMENT OF ERRORS

1. The trial court erred when it failed to find that Coast Quality Construction Company provided as a benefit to its employees, including Charlie Kornman, a medical expense plan which was insured by Louisiana Health Service and Indemnity Company (Blue Cross/Blue Shield of Louisiana).

2. The trial court erred when it failed to find that the medical expense plan provided by Coast Quality Construction Company to its employees, including Charlie Kornman, was an ERISA plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA").

3. The trial court erred when it failed to find that the claims of plaintiffs-appellees including the claim under La.R.S. 22:657 and other state laws argued by plaintiff-appellees were preempted by ERISA.

4. The trial court erred when it failed to find that the medical expense plan provided by Coast Quality Construction Company to its employees, including Charlie Kornman, was an indispensable party to this suit.

5. The trial court erred when it failed to find that the suit filed by plaintiff-appellees was premature.

* * *

ISSUES PRESENTED FOR REVIEW

1. Whether Coast Quality Construction Company provided as a benefit to its employees, including Charlie Kornman, a medical expense plan which was insured by Louisiana Health Service and Indemnity Company (Blue Cross/Blue Shield of Louisiana)?

2. Whether the medical expense plan provided by Coast Quality Construction Company to its employees, including Charlie Kornman, is an ERISA plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA")?

3. Whether the claims of plaintiffs-appellees including the claim under La.R.S. 22:657 and other state laws argued by plaintiff-appellees are preempted by ERISA?

4. Whether the medical expense plan provided by Coast Quality Construction Company to its employees, including Charlie Kornman, is an indispensable party to this suit?

5. Whether the suit filed by plaintiff-appellees is premature?

* * *

ARGUMENT

I. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA) GOVERNS THIS MATTER

A. *The Medical Expense Plan Under Which Plaintiffs-Appellees Claim Entitlement to Benefits is an ERISA Plan.*

The trial court erred in finding that the plan under which the plaintiffs-appellees claim entitlement to benefits is not an ERISA plan. Coast established a medical expense plan insured by Blue Cross for its employees. Charlie Kornman enrolled himself and his wife, Janette, in the medical expense plan as an employee of Coast. See, Blue Cross Exhibit "2". Initially Charlie Kornman did not attempt to enroll Richard Kornman as a dependent. Testimony of J. Kornman, Transcript at pp. 1982-83; Testimony of D. Epstein, Transcript at pp. 942-944, 1014. Later he attempted to qualify Richard Kornman as his dependent under this plan. See, Blue Cross Exhibit "3". Alternatively, plaintiffs-appellees claim that Richard Kornman, individually, enrolled in the plan as an employee of Coast.

The medical expense plan under which plaintiffs claim they are entitled to benefits is, in reality, an "employee welfare benefit plan" as defined by ERISA. 29 U.S.C. §1002(1). An ERISA plan is defined as:

> any plan, fund or program . . . established by an employer or employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of the insurance or otherwise, (A) medical, surgical or hospital care or

> benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

See, 29 U.S.C. §1002(1). The medical expense plan Coast established for its employees clearly qualifies as an ERISA plan under the language of the statute, because it is a program established by Coast for the purpose of providing medical, surgical or hospital benefits in the event of sickness or accident to the employees of Coast. Additionally, the Coast plan qualifies as an ERISA plan in light of recent decisions by the U. S. Fifth Circuit as to what constitutes an ERISA plan.

The Fifth Circuit of the United States Court of Appeals has found that employer's involvement in the plan determines whether a plan meets the requirements to establish an ERISA welfare benefit plan. See, Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 242-43 (5th Cir. 1990); Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1016-17, n.2 (5th Cir. 1993), cert. den'd, __ U.S.__, 113 S.Ct. 2455, 124 L.Ed.2d 671.

In Rodriguez, the employees contributed, through payroll deductions, a portion of the insurance premiums; the employer paid the balance. The Fifth Circuit specifically held in Rodriguez that such an arrangement and involvement by the employer established an ERISA plan. Rodriguez, 980 F.2d at 1017, n.2. Likewise, a similar arrangement by the employer was found sufficient in the Memorial Hospital case to establish an ERISA plan. Memorial Hospital, 904 F.2d at 242-43. The Fifth Circuit noted that "[t]he fact that [an employer's] administrative functions over the policy are minimal is perfectly in keeping with the intent that [the insurer] administer the plan as well as insure it." Id.

The Coast plan is exactly the same situation that occurred in Rodriguez and Memorial Hospital. The Coast employees con-

tributed, through payroll deductions, a portion of the insurance premiums; Coast paid the balance. See, Testimony of D. Epstein, Transcript at pp. 987- 89. The Fifth Circuit has specifically held that such a plan qualifies as an ERISA benefit plan. The trial court was, therefore, incorrect in holding that ERISA does not apply to this matter.

The plaintiffs-appellees rely heavily upon Taggart Corp. v. Life & Health Benefits Adm., Inc., 617 F.2d 1208 (5th Cir. 1980), cert. den'd sub nom, Taggart Corp. v. Efros, 450 U.S. 1030 (1981). Taggart is inapposite in this matter. In Taggart, a corporation with one employee purchased an interest in a multi-employers' trust. Employers who had too few employees to qualify for group insurance rates would subscribe to the trust and become members of the trust group of subscribers. The Fifth Circuit held that ERISA was inapplicable, not because a group insurance policy was involved, but because the multi-employers' trust was not established by an employer and/or employee organization, as those terms are defined by ERISA. Taggart, 617 F.2d at 1210. Plaintiffs-appellees errantly rely on Taggart for the proposition that bare purchases of health insurance do not qualify as an ERISA plan. However, putting the Fifth Circuit's statement in context, the Fifth Circuit actually held:

> Considering the history, structure and purpose of ERISA, we cannot believe that the Act regulates bear purchases of health insurance, where, as here, the purchasing employer neither directly or indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.

Id. at 1211 (emphasis added). In this case, Coast clearly, as purchasing employer, directly owned, controlled, administered and/or assumed responsibility for the policy and its benefits. Coast administered the payroll deductions for the employees'

contribution for their portion. Coast additionally assumed responsibility for the policy by committing to pay the balance of the insurance premiums. Testimony of D. Epstein, Transcript at pp. 987-89; see also, Testimony of M. Echlin, Transcript at p. 1730. The Fifth Circuit finds that such an arrangement is sufficient for the necessary employer relationship to constitute an ERISA plan. See, Rodriguez, 980 F.2d at 1017, n.2; Memorial Hosp., 904 F.2d at 242-43. Moreover, while the bare purchase of an insurance policy does not necessarily establish the existence of an ERISA plan, the U.S. Fifth Circuit Court of Appeals has recently held that an employer's payment of premiums on behalf of its employees is substantial evidence that a plan, fund or program under ERISA was established. See, Kidder v. H & B Marine, Inc., 932 F.2d 347 (5th Cir. 1991).

The trial Testimony of Mr. David Epstein, an employee of Coast who arranged for the plan, demonstrates that Coast desired and chose to provide health benefits for its employees, chose the coverage it would provide, paid a percentage of each employee's premium, deducted the remaining percentage from each employee's paycheck, and was responsible for submitting the premiums to Blue Cross each month. See, Testimony of D. Epstein, Transcript at pp. 987-89.

Contrary to the plaintiffs' assertions, a formal document designated as "the plan" is not required to establish the existence of an ERISA plan. Otherwise, employers could avoid federal regulation merely by failing to memorialize their employee benefit programs in a separate document designated as such. See, Donovan v. Dillingham, 688 F.2d 1367, 1373 n.5 (11th Cir. 1982) (en banc). It is irrelevant whether Coast intended to create an ERISA plan. Coast intended to provide a means by which its employees would receive medical benefits and payment of medical claims. Because the Coast plan is an ERISA plan, plaintiffs are limited in their relief to the civil enforcement

provisions of ERISA. See, 29 U.S.C. §1132. See also, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39, 50-51 (1987).

B. *The Medical Expense Plan Established by Coast is an Indispensable Party*

The trial court erred in holding that the ERISA plan, itself, established by Coast was not an indispensable party. The civil enforcement provisions of ERISA are contained in 29 U.S.C. §1132. Section 1132(d) makes clear that an ERISA plan "may sue or be sued . . . as an entity." The statute goes on to state that: "Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability is established in his individual capacity under this subchapter." 29 U.S.C. §1132(d)(2). Where plaintiffs are seeking to recover benefits allegedly due to them under the terms of an ERISA plan, the proper defendant is the plan, which may be sued as an independent entity pursuant to 29 U.S.C. §1132(d)(1). Jourdan v. Claims, Inc., 1992 U.S. Dist. LEXIS 2157 (W.D Mich. 1992); Jenkinson v. Chevron Corp., 634 F. Supp. 375, 377 (N.D. Cal. 1986). See, attached Exhibit "B". Therefore, the ERISA plan established by Coast is an indispensable party to the suit filed by plaintiffs-appellees, and thus, this matter should be dismissed for plaintiffs-appellees' failure to join the ERISA plan established by Coast as a proper party defendant.

C. *Plaintiffs-Appellees' Lawsuit is Premature*

The trial court erred in holding that the instant lawsuit was not prematurely filed. Pursuant to the terms of the ERISA plan established by Coast, as set forth in the plan summary, if the plaintiffs-appellees believe that their claims were improperly

denied, they should have filed an appeal with the ERISA review department of Blue Cross within sixty days after the plan mailed a written notice of denial of the claim. See, Plan Summary for 1984, Plaintiffs Exhibit "3", p. 15, Employee Booklet; Plan Summary for 1985, Plaintiffs Exhibit 4, p. 26, Employee Booklet; Plan Summary for 1987, Plaintiffs Exhibit 6, P. 15, Employee Booklet. The plaintiffs-appellees have never filed such an appeal. Their suit is, therefore, premature and should be dismissed since the plaintiffs-appellees failed to exhaust their administrative remedies under the ERISA plan.

The U.S. Fifth Circuit Court of Appeals has recently reaffirmed its holding that a failure to exhaust the administrative remedies provided for in an ERISA plan forecloses judicial review of the claim denial. Rodriguez, 980 F.2d at 1016 n.1. See also, Denton v. First Nat'l Bank, 765 F.2d 1295, 1300-03 (5th Cir. 1985); Taylor v. South Central Bell, 422 So.2d 528, 29 (La.App. 5th Cir. 1982), citing, Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980); Steeg v. Lawyer's Title Insurance Corp., 329 So.2d 719 (La. 1976) ("It is well-established that the failure to pursue and exhaust administrative remedies precludes judicial relief."). As one court has noted, administrative responsibility rests with those whose experience is daily and continual, and not with judges whose exposure is episodic and occasional. Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985).

In Rodriguez, an employee was attempting to collect benefits provided to him by his employer through Pacificare, a health maintenance organization (HMO). Pacificare denied the employee's claim for care received outside his HMO plan. The plaintiff bypassed the administrative procedures for contesting the claim denial and filed suit in state court. The Fifth Circuit upheld summary judgment against Rodriguez noting that the deadline for Rodriguez to use the grievance procedures outlined in the ERISA plan had long since passed; therefore, the Fifth

Circuit refused to remand the case, stating that such action would have been futile. Rodriguez, 980 F.2d at 1016 n.1.

In this case, the plaintiffs failed to exhaust their administrative remedies before filing suit in state court. Such a failure to exhaust administrative remedies provided for in the ERISA plan forecloses judicial review of the claim denial. Rodriguez, 980 F.2d at 1016 n.1. The deadlines for the plaintiffs to use the plan's grievance procedure has long since passed; therefore, any action to remand this case would now be futile and plaintiffs-appellees' suit should be dismissed. See, Plan Summary for 1984, Plaintiffs Exhibit "3", p. 15, Employee Booklet; Plan Summary for 1985, Plaintiffs Exhibit 4, p. 26, Employee Booklet; Plan Summary for 1987, Plaintiffs Exhibit 6, P. 15, Employee Booklet.

D. *Plaintiffs-Appellees' State Law Claims are Preempted*

The trial court erred in finding that the plaintiffs'-appellees' state law claims were not preempted by ERISA. Plaintiffs'-appellees' sole basis for recovery is alleged violations of state law and Louisiana Revised Statutes. Plaintiffs-appellees also contend that they are entitled to penalties and attorneys fees pursuant to La.R.S. 22:657. This statute is completely preempted by ERISA's civil enforcement provision, 29 U.S.C. §1132. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d, 39, 51 (1987). In Pilot Life, the Supreme Court held that the civil enforcement provisions of ERISA were intended by Congress to be the "exclusive vehicle for action by ERISA-plan participants and beneficiaries asserting improper processing of claims for benefits, and that the varying state causes of action for claims within the scope of [section] 1132 would pose an obstacle to the purposes and objectives of Congress." Pilot Life, 95 L.Ed.2d at 50-51. The Supreme Court further noted that:

> Policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in [section 1132] of the statute as finally enacted . . . provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

Id. at 52, quoting, Massachusetts Life Ins. Co. v. Russell, 473 U.S. 134, 146, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).

Louisiana Revised Statute 22:657 clearly provides a remedy to participants and beneficiaries claiming benefits which was not intended nor provided by 29 U.S.C. §1132. ERISA contains no provision for punitive damages. Russell, 473 U.S. at 144. Therefore, both Louisiana state courts and federal courts have been uniform in holding that ERISA preempts Louisiana Revised Statute 22:657. Cramer v. Association Life Ins. Co., 569 So.2d 533 (La. 1990), cert. den'd, 499 U.S. 938 (1991). See also, Tingle v. Pacific Mut. Ins. Co., 996 F.2d 105, 109-110 (5th Cir. 1993); West v. Connecticut General Life Ins. Co., 591 So.2d 1296 (La. App. 3d Cir. 1991); Taylor v. Blue Cross/Blue Shield of New York, 684 F. Supp. 1352, 1356-59 (E.D. La. 1988). Moreover, plaintiffs'-appellees' assertion that preemption only applies in the context of self-funded ERISA plans, is clearly wrong. The United States Supreme Court specifically held in Pilot Life that ERISA's preemption provisions apply in the context of an insured employee benefit plan. Pilot Life, 95 L.Ed.2d at 45 and 51-52. See also, Cramer, 569 So.2d at 533 (Louisiana Supreme Court likewise applied ERISA's preemption provisions to an insured plan).

Moreover, ERISA preempts all state laws which "relate to" an ERISA plan. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); 29 U.S.C. §1144(a); Cramer v. Association Life Ins. Co., 569 So.2d 533, 535 (La. 1990). Traditional state law contract claims against an employee benefit plan regulated by ERISA are preempted by ERISA. Pilot Life, 95 L.Ed.2d at 52. See also, West v. Connecticut General Life Ins. Co., 591 So.2d 1296, 1297 (La. App. 3d Cir. 1991). A state law which "relates to" an employee benefit plan will be "saved" from preemption if it regulates insurance. 29 U.S.C. §1144(b)(2)(A). See also, Cramer, 569 So.2d at 535. However, even if a state law "regulates insurance" it will still be preempted if application of the state law would effectively "deem" an employee benefit plan to be an insurer. 29 U.S.C. §1144(b)(2)(B). The Louisiana Supreme Court discussed the relationship of ERISA to state insurance laws:

> Recognizing that the broad provisions of ERISA overlap with numerous state regulatory laws, Congress put in ERISA three provisions relating to the preemptive effect of the federal legislation, often referred to as the preemption clause, the savings clause and the deemer clause. The preemption clause states:
>
> > except as provided in subsection (b) of this section [the savings clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . (*emphasis added*). [29 U.S.C. §1144(a)]
>
> The savings clause states:
>
> > except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed

> to exempt or relieve any person from any law of any state which *regulates insurance*, banking or securities. (*emphasis added*). [29 U.S.C. subsection 1144(b)(2)(A)]

The deemer clause states:

> neither any employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the *business of insurance* . . . for purposes of any law of any state purporting to regulate insurance companies [or] insurance contracts . . . (*emphasis added*). [29 U.S.C. subsection 1144(b)(2)(B)].

Cramer, 569 So.2d at 535. The Louisiana Supreme Court stated that the deemer clause, the savings clause and the preemption clause generally work as follows: "If a state law relates to employee benefit plans, it is preempted unless the law regulates insurance, in which case the savings clause saves the law from preemption; but, a state law that purports to regulate insurance may not deem an employee benefit plan to be an insurance company." Id.

The term "relates to" is expansive and should be read in its broad common-sense meaning such that a state law relates to a plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." West, 591 So.2d at 1298, quoting, Shaw v. Delta Airlines, 463 U.S. at 96-97. See also, Cramer, 569 So.2d at 536.

As used in the savings clause, the term "regulates insurance" means that a state law "must not just have an impact on the insurance industry, but must be specifically directed towards that industry." West, 591 So.2d at 1298, quoting, Pilot Life, 95

L.Ed.2d at 49. The savings clause saves from preemption those state laws which regulate the "business of insurance" as that phrase is defined by the case law interpreting the McCarron-Fergerson Act. Pilot Life, 95 L.Ed. 2d at 48. The Supreme Court has adopted three criteria in interpreting the phrase "business of insurance":

> (1) whether the practice has the effect of transferring or spreading a policyholder's risk;
>
> (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and
>
> (3) whether the practice is limited to entities within the insurance industry.

West, 591 So.2d at 1298; Taylor, 684 F.Supp. at 1358-59. See also, Pilot Life, 95 L.Ed. 2d at 48; Cramer, 569 So.2d at 537-38. Finally, the deemer clause provides that an ERISA plan shall not be "deemed by any state law to be an insurance company, to be engaged in the business of insurance, or to be an insurance contractor for purposes of applying the savings clause." Pilot Life, 95 L.Ed 2d at 46.

The trial court erred in finding that even if ERISA did apply to this case, it would not have altered the outcome of this matter as to coverage. Using the analysis outlined above with regards to the deemer clause, savings clause and preemption clause, Louisiana state courts and federal courts have found that Louisiana Revised Statute 22:657 has been preempted by ERISA. The trial court was in error where it held that ERISA would only preempt Louisiana Revised Statute 22:657 and would not affect

the other insurance laws relied upon by plaintiffs-appellees. Other statutes relied upon by the plaintiffs in this case are also preempted. Using the preemption analysis above, courts have found that ERISA preempts Louisiana Revised Statute 22:619(B)[1], another statute relied upon by the plaintiffs-appellees. Tingle v. Pacific Mut. Ins. Co., 996 F.2d 105 (5th Cir. 1993). Additionally, the Fifth Circuit noted that other courts have held that the case law holding that ambiguous terms in an insurance contract are to be construed against the insurer is also preempted by ERISA. Tingle, 996 F.2d at 110 n.25, citing, McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426, 428-30 (6th 1989). The court applied the three part test and found that the law did not spread policy holder's risk but, instead forces the insurer to bear the legal risk associated with the ambiguous policy language. Id. Additionally, the court noted that the law was not aimed directly at the insurance industry because it derived from state law. Id. See also, Brewer v. Lincoln National Life Ins. Co., 921 F.2d 150 (8th Cir. 1990), cert. den'd, __ U.S. __, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991) (Missouri law requiring that ambiguities in insurance contracts be construed against insurer is preempted by ERISA). The trial court's finding that the plaintiffs' state law claims have not been preempted by ERISA is clearly incorrect, since the plaintiffs-appellees' pleadings allege only violations of state law and statutes which have been preempted by ERISA; therefore, the Judgment of the Court should be reversed and the plaintiffs-appellees' suit dismissed.

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[1] Louisiana Revised Statute 22:619(B) provides:

In any application for life or health insurance made in writing by the insured, all statements made therein by the insured shall, in the absence of fraud, be deemed representations and not warranties. The falsity or any such statement shall not bar the right to recovery under the contract unless such false statement was made with actual intent to deceive, or unless it materially effected either the acceptance of the risk or the hazard assumed by the insurer.

West, 591 So.2d at 1299; Rodriguez, 980 F.2d at 1016 n.1.

* * *

CONCLUSION

In conclusion, Blue Cross asserts that the medical expense plan adopted by Coast and insured by Blue Cross qualifies as an ERISA plan. For this reason, Blue Cross submits that ERISA governs this matter. Under ERISA, plaintiffs-appellees' suit is premature. Also, plaintiffs-appellees have failed to join an indispensable party, the medical expense plan, itself. Additionally, plaintiffs-appellees' suit is based upon state law claims which have been preempted by ERISA.

* * *

Accordingly, it is respectfully submitted that the Judgment of the trial court should be reversed and judgment entered in favor of defendant-appellant, Blue Cross.

Respectfully submitted:
s/Sylvan J. Steinberg

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Appellant Brief has been served on Marion F. Edwards, Esq., Post Office Box 81, Gretna, LA. 70054, and David Charles Loeb, Esq., 3445 North Causeway Blvd., Suite 103, Metairie, LA. 70002, by hand, facsimile, or by U.S. Mail, postage prepaid and properly addressed, this 13th day of June, 1994.

s/Sylvan J. Steinberg
SYLVAN J. STEINBERG

APPENDIX G

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 94-CA-306

JANETTE M. wife of/and CHARLIE KORNMAN,
Individually
and on behalf of their dependent son,
RICHARD JAY KORNMAN

Plaintiffs-Appellees

VERSUS

BLUE CROSS/BLUE SHIELD OF LOUISIANA

Defendant-Appellant

Appeal from the Twenty-Fourth Judicial District
Court, Parish of Jefferson, State of Louisiana,
Docket No. 364,688, Div. "E",
the Honorable Clarence E. McManus, Presiding

APPLICATION BY DEFENDANT-APPELLANT LOUISIANA HEALTH SERVICE AND INDEMNITY COMPANY (BLUE CROSS/BLUE SHIELD OF LOUISIANA) FOR REHEARING

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APPLICATION BY DEFENDANT-APPELLANT FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes Louisiana Health Service and Indemnity Company (Blue Cross/ Blue Shield of Louisiana), defendant-appellant, who respectfully represents that the Judgment of this Honorable Court rendered herein on the 26th day of September, 1995, affirming the Judgment of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana awarding Judgment in favor of plaintiffs-appellees and ordering defendant-appellant to bear the costs of appeal is in error, contrary to the law, contrary to the evidence and prejudicial to the defendant-appellant for the following reasons:

1.

This Honorable Court is in error in holding that the medical expense plan (MEP) established by the employer, Coast Quality Construction Company (hereinafter called "Coast") for its employees is not an employer medical expense plan as defined by the Employee Retirement Income Security Act (ERISA). As more fully set forth in the brief made part of this Application for Rehearing, in so holding, this Court is in conflict with the Court of Appeal, First Circuit, State of Louisiana in the case of Cramer v. Association Life Insurance Company, 563 So.2d 267 (La.App. 1st Cir. 1990). The Louisiana Supreme Court did not reverse the First Circuit finding and holding that the MEP in that case was an ERISA plan. In fact the Louisiana Supreme Court followed the findings and holding of the First Circuit to hold that ERISA preempted state law. Cramer v. Association Life Insurance Company, 569 So.2d 533 (La. 1990), cert. denied, 499 U.S. 938 (1991). This Court is also in conflict with the Court of Appeal, Third Circuit, State of Louisiana in the case of West v. Connecticut General Life Insurance Company, 591 So.2d 1296 (La.App. 3rd Cir. 1991). The Third Circuit in the West case held the plan to be an ERISA plan. Also as more fully set forth in said brief, this Court is in error because it found that there was no trust for ERISA to protect and that there was no evidence that Coast owned, controlled or assumed responsibility for the plan and policy. The Court is in error in following the case of Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208 (5th Cir. 1980) cert. denied 450 U.S. 1030 (1981). Taggart is a U.S. Fifth Circuit decision that this Honorable Court follows but it declines to follow later U.S. Fifth Circuit decisions that distinguish it. The later U.S. Fifth Circuit cases relied on by defendant-appellant do not disregard the purpose of ERISA but adhere to it in factual situations that ERISA was intended to apply to. It is submitted that the Coast MEP for its employees was an ERISA plan. This Honorable Court should have considered whether the Coast

MEP is an indispensable party, whether plaintiffs suit is premature for failure to exhaust administrative remedies and whether the state law relied on by plaintiffs-appellees is preempted by ERISA.

* * *

10.

Defendant-appellant files herewith in connection with this application for a new hearing, a brief in support thereof and shows that for the reasons hereinabove stated and enlarged in the said brief a rehearing should be granted.

WHEREFORE, the premises considered, defendant-appellant prays that a rehearing be granted in this appeal and that after due proceedings had the judgment and opinion rendered herein on the 26th day of September, 1995, be set aside and reversed and that there be judgment entered herein in favor of your defendant-appellant dismissing plaintiffs-appellees demands at their cost and to their prejudice.

s/Sylvan J. Steinberg
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Application by Defendant-Appellant for Rehearing has been served on Marion F. Edwards, Esquire, Post Office Box 81, Gretna, Louisiana, 70054, and David Charles Loeb, Esquire, 3445 North Causeway Boulevard, Suite 103, Metairie, Louisiana, 70002, by hand, facsimile, or by U.S. Mail, postage prepaid and properly addressed this 10TH day of October, 1995.

s/Sylvan J. Steinberg
SYLVAN J. STEINBERG

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

DOCKET NO. 94-CA-306

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Defendant-Appellant

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Court, Parish of Jefferson, State of Louisiana,
Docket No. 364,688, Div. "E",
the Honorable Clarence E. McManus, Presiding

BRIEF IN SUPPORT OF APPLICATION BY DEFENDANT-APPELLANT LOUISIANA HEALTH SERVICE AND INDEMNITY COMPANY (BLUE CROSS/BLUE SHIELD OF LOUISIANA) FOR REHEARING

Respectfully submitted

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MAY IT PLEASE THE COURT:

I. THE MEDICAL EXPENSE PLAN ESTABLISHED BY COAST QUALITY CONSTRUCTION CO. FOR ITS EMPLOYEES IS AN ERISA PLAN

The Medical Expense Plan (MEP) established by Coast Quality Construction Company (Coast) for its employees, one of which was Charlie Kornman, is a Medical Expense Plan as defined by the Employee Retirement Income Security Act (ERISA). This Honorable Court erred in holding that the Coast MEP is not an ERISA plan. In so holding this Court is in conflict with the Court of Appeal, First Circuit, State of Louisiana in the case of Cramer v. Association Life Insurance Company, 563 So.2d 267 (La.App. 1st Cir. 1990). In the Cramer case the First

Circuit Court of Appeal found the facts to be:

> *The record shows that Mr. Cramer's employer, ABC, through its president, Charles Cramer, Sr., made an application for group life, health, and medical insurance with ALIC. The group insurance application by ABC was approved by ALIC and became effective on August 1, 1985. Charles Cramer, Jr., an employee of ABC, together with his wife and minor daughter were covered under the group policy, as were other employees of ABC, their spouses, and their dependents. According to ABC's application, ABC contributed 50% of the cost of the employee benefits.*
>
> *Under the factors set forth in Donovan, we find that ABC established an employee benefit plan for the purpose of purchasing insurance. The extended benefits were provided to the employees of ABC, their spouses, and their dependents. Fifty percent of the insurance premiums were paid by ABC, and ABC, not the individual employees, maintained the plan.*
>
> *Accordingly, we find that the ABC plan is an employee welfare benefit plan within the contemplation of ERISA and that the trial court erred in finding to the contrary.* See *Cramer v. Association Life Insurance Co.*, 563 So.2d 267, at p. 272 (La. App. 1st Cir. 1990).

The facts in the Cramer case are very similar, if not the same as those in the instant case. ABC, as did Coast, made an application of medical insurance to cover its medical expense plan for its employees. The employees of ABC were covered under the insurance as were the employees of Coast. ABC, as did Coast, contributed to the cost of premiums, and ABC, as did Coast, paid the balance of premiums to maintain the insurance

and plan. Accordingly, the ABC plan as found by the First Circuit Court of Appeal was an ERISA plan just as this Court should find the Coast MEP an ERISA plan. The First Circuit Court of Appeal did not ignore Taggart Corp. v. Life and Health Benefits Administration, 617 F.2d 1208 (5th Cir. 1980) cert. denied 450 U.S. 1030 (1981). Taggart was not applicable because the facts in Taggart were entirely different from the facts in the Cramer case relative to the medical expense plan provided by the employer. The facts in this case are also entirely different from the facts in Taggart.

(1) Unlike the Taggart case where there was only one employee, Charlie Kornman was not the only employee of Coast and not the only employee of Coast enrolled in the medical expense as was the case in Taggart;

(2) Unlike the Taggart case, this case does not involve the bare purchase of insurance. Coast was much more involved with the medical expense plan as follows:

(3) Coast chose to provide health benefits for its employees and arranged for the plan;

(4) Coast chose the coverage the plan would provide to its employees;

(5) Coast paid a percentage of each employee's premium;

(6) Coast deducted the remaining percentage from each employee's paycheck through payroll deductions;

(7) Coast controlled and administered all funds deducted from employee's paychecks;

(8) Coast assumed responsibility for submitting the premium payments to Blue Cross each month;

(9) Coast assumed responsibility for the balance of premiums.

All of this evidence and these facts were brought out during the trial of this matter in the 24th Judicial District Court. See, Testimony of D. Epstein, Tr. at pp. 987-89, Testimony of M. Echlin, Tr. at p. 1730.

As pointed out above the facts in the Cramer case are very similar, if not the same as those in this case. Thus, the argument that the Taggart case should be followed by this Court to find the Coast MEP is not an ERISA plan is not well founded. Taggart is only applicable to cases with similar fact situations. This case with the Kornmans and the Coast MEP is not such a case. Clearly, the facts in the instant case are directly at odds with the facts in the Taggart case.

In holding that the Coast MEP is not an ERISA plan this Court is also in conflict with the Court of Appeal, Third Circuit, State of Louisiana in the case of West, Jr. v. Connecticut General Life Insurance Company, 591 So.2d 1296 (La. App. 3rd Cir. 1991). In that case in a footnote at page 1297 the Third Circuit held:

> 1. Although it is unclear whether West also contends that the disability policy issued by Connecticut is not an ERISA-type plan and not subject to ERISA, we have considered that contention nonetheless and conclude that the Con-

> necticut policy is an ERISA-type plan. The record shows that the plan is offered only to employees of the employer, Raymond International, is co-sponsored and maintained by Raymond International and includes specific references to ERISA in the summary plan description of the disability policy. These factors make it clear that the disability policy is an ERISA-type plan. 29 U.S.C. § 1002; *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988); cert. denied, 492 U.S. 906, 109 S.Ct. 3216, 106 L.Ed. 566 (1989).

As in the West case Coast offered the plan to employees of Coast, the employer. Also ERISA is specifically referred to in the Coast MEP. See Plan Summary for 1984, Plaintiffs Exhibit 3 p. 15, Employee Booklet; Plan Summary for 1985, Plaintiffs Exhibit 4, p. 26, Employee Booklet, Plan Summary for 1987, Plaintiffs Exhibit 6, p. 15, Employee Booklet.

Furthermore, this Court is in error in its finding that there was no trust for ERISA to protect. The MEP established by Coast for its employees had assets to protect and those assets should be protected by ERISA. Coast and the MEP had a fiduciary relationship with its employees who were participants in and members of the MEP, and Coast had a trust of their funds. Coast deducted for the MEP a percentage from each employees pay check through payroll deductions to pay for each employees premium due for participation in the MEP. Coast itself paid the remaining percentage due for each employees premium. Coast controlled and administered for the MEP all funds deducted from employees' pay checks and controlled and administered its own funds to pay premiums. Coast assumed responsibility for the

MEP for submitting the premium payments to Blue Cross each month. Coast assumed responsibility for the balance of the premiums due by the MEP. Coast thus established a trust of employee funds and Coast funds to pay premiums due by the MEP. The MEP and Coast had a trust and fiduciary responsibility to Coast employees and the MEP established by Coast for its employees that ERISA is intended and meant to protect and should protect.

ERISA applies to both self-insured as well as insured medical expense plans. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed. 2d 728 (1985); Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 St.Ct. 1549, 95 L.Ed. 39, 50-51 (1987). What more control, administration and responsibility could any employer have with an MEP than what Coast had? It controlled what insurance was purchased, what coverages were provided, what percentage of premiums each employee paid, administered how the premiums are paid, assumed responsibility for payment of premiums. If this is not enough involvement of an employer in an MEP then the implication of this Courts' holding is that an insured MEP is not an ERISA plan. The Coast MEP did not simply purchase insurance. It controlled, administered and assumed responsibility for the MEP. This is not the "bare purchase of health insurance."

The Coast MEP for its employees is an ERISA plan and this Court should have considered whether the Coast MEP is an indispensable party, whether plaintiffs-appellees suit is premature for failure to exhaust administrative remedies and whether the state law relied on by plaintiffs-appellees is preempted by ERISA.

* * *

CONCLUSION

Considering the arguments made in defendant-appellant's Application for Rehearing and this Brief in Support of the Application for Rehearing this Honorable Court should grant a rehearing in this matter and after due proceedings the judgment and opinion rendered by this Honorable Court on September 26, 1995, should be set aside and reversed and judgment entered herein in favor of your defendant-appellant, Louisiana Health Service and Indemnity Company (Blue Cross/Blue Shield of Louisiana), dismissing plaintiffs-appellees demand, at their costs and to their prejudice.

Respectfully submitted:

s/Sylvan J. Steinberg
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Brief in Support of Application by Defendant-Appellant Louisiana Health Service and Indemnity Company (Blue Cross/ Blue Shield of Louisiana) for Rehearing has been served on

Marion F. Edwards, Esquire, Post Office Box 81, Gretna, Louisiana, 70054, and David Charles Loeb, Esquire, 3445 North Causeway Boulevard, Suite 103, Metairie, Louisiana, 70002, by hand, facsimile, or by U.S. Mail, postage prepaid and properly addressed this 10th day of October, 1995.

s/Sylvan J. Steinberg

SYLVAN J. STEINBERG

APPENDIX H

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 364-688 DIVISION "E"

JANETTE M., WIFE OF/AND CHARLIE KORNMAN,
INDIVIDUALLY AND ON BEHALF OF THEIR
DEPENDENT SON, RICHARD JAY KORNMAN

VERSUS

BLUE CROSS/BLUE SHIELD OF LOUISIANA

FILED:_____ _____
DEPUTY CLERK

EXCEPTIONS

NOW INTO COURT, through undersigned counsel, comes defendant Louisiana Health Service and Indemnity Company (Blue Cross/Blue Shield of Louisiana), appearing herein solely for the purposes of these exceptions, and excepts to the plaintiffs' Petition and Amended Petition on the following grounds:

1.

The said Petition and Amended Petition disclose no cause or right of action for the reasons more particularly set forth

in the Memorandum attached hereto and made a part hereof.

2.

Janette and Charlie Kornman lack procedural capacity to bring suit for the reasons more particularly set forth in the Memorandum attached hereto and made a part hereof.

3.

There is a nonjoinder of a necessary party defendant herein for the reasons more particularly set for in the Memorandum attached hereto and made a part hereof.

4.

Plaintiffs' plea is premature in that plaintiffs have failed to exhaust their administrative remedies for the reasons more particularly set forth in the Memorandum attached hereto and made a part hereof.

5.

This Honorable Court is without jurisdiction over the subject matter of the above-captioned matter for the reasons more particularly set forth in the Memorandum attached hereto and made a part hereof.

WHEREFORE, exceptor prays that the above exceptions, as more fully set forth in the attached Memorandum incorporated by reference herein, be maintained and that the suit be dismissed at plaintiffs' costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served on all counsel of record by hand or by placing same in the United States Mail, postage prepaid and properly addressed, this __ day of January, 1989.

s/Sylvan J. Steinberg

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 364-688 DIVISION "E"

JANETTE M., WIFE OF/AND CHARLIE KORNMAN,
INDIVIDUALLY AND ON BEHALF OF THEIR
DEPENDENT SON, RICHARD JAY KORNMAN

VERSUS

BLUE CROSS/BLUE SHIELD OF LOUISIANA

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF EXCEPTIONS

NOW INTO COURT, through undersigned counsel, comes Louisiana Health Service and Indemnity Company (Blue Cross and Blue Shield of Louisiana) (hereinafter referred to as "Blue Cross"), and respectfully submits this Memorandum in support of the Exceptions filed by Blue Cross in the above-captioned suit.

I.

FACTS

* * *

II.

PEREMPTORY EXCEPTIONS

A. NO RIGHT AND/OR CAUSE OF ACTION

* * *

Further, none of the plaintiffs have stated a valid cause of action because the causes of action alleged in the plaintiffs' suit have been preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq. What Coast has offered its employees is an ERISA plan. Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982); Dependahl v. Falstaff Brewing Corp., 491 F.Supp. 1188 (E.D. Mo. 1980), mod. on other grounds, 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Credit Manager's Association v. Kennesaw Life and Accident Insurance Co., 809 F.2d 617 (9th Cir. 1987); Bausch and Lomb, Inc. v. Smith, 630 F.Supp. 262 (W.D.N.Y. 1986); Benvenuto v. Connecticut General Insurance, 643 F.Supp. 87 (D.N.J. 1986).

ERISA preempts any state law that "relates to" an ERISA plan. 29 U.S.C. §1144(a); see also Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549; 95 L.Ed.2d 39 (1987). Although ERISA's preemption provision contains a "savings clause", 29 U.S.C. §1144(b)(2)(a), state law penalty statutes such as Louisiana R.S. 22:657, which is raised by plaintiffs, are not saved from preemption by that section. Taylor v. Blue Cross/ Blue Shield of New York, 684 F.Supp. 1352, 1356 (E.D. La. 1988); Rasmussen v. Metropolitan Life Insurance Co., 675 F.Supp. 1497, 1503 (W.D. La. 1987). See also Locklear v. Visko's, So.2d 933 (La. App. 5th Cir. 1988) (La. R.S. 22:213 and 22:636 are preempted by ERISA).

In addition to the preemptive action of 29 U.S.C. § 1144, the Supreme Court has held that ERISA's civil enforcement provision, 29 U.S.C. §1132, preempts all other causes of action concerning a claim for benefits by a member or beneficiary of the ERISA plan. Dedeaux, 95 L.Ed.2d at 52; Varhola v. Doe, 820 F.2d 809, 817 (6th Cir. 1987); Roberson v. The Equitable Life Assurance Society of the United States, 661 F.Supp. 416, 424 (C.D. Cal. 1987); Smith v. Electronics Data Systems Corp., 657 F.Supp. 1242, 1243 (D. Colo. 1987); Taylor, 684 F.Supp. at 1358. ERISA does not provide a claim for punitive damages. 29 U.S.C. §1132; see Sommer's Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1464-65 (5th Cir. 1986), cert. denied, 107 S.Ct. 884 and 107 S.Ct. 1298 (1987); Varhola v. Doe, 820 F.2d at 817; Kleinhaus v. Lisle Savings Profit Sharing Trust, 810 F.2d 617 (7th Cir. 1987); Powell v. Chesapeake and Potomac Telephone Co., 780 F.2d 419, 424 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir.), cert. denied, 454 U.S. 968 (1981). As the Supreme Court reasoned in Dedeaux:

> [T]he detailed provisions of [§1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plan. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in [§1132(a)] of the statute provide strong evidence that Congress did not intend to authorize other

remedies that it simply forgot to incorporate directly."

Dedeaux, 95 L.Ed.2d at 52, quoting Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 146 (1985).

Louisiana R.S. 22:657 clearly provides a remedy not granted by ERISA and is thus preempted under 29 U.S.C. §1132.

III.

DILATORY EXCEPTIONS

* * *

B. NONJOINDER OF A NECESSARY PARTY

As was discussed above, the Coast Quality Construction Company Group Medical Contract constitutes an ERISA plan under 29 U.S.C. §1001, et seq. The Plan is established by Coast Quality Construction Company for the benefit of its employees. In suits under ERISA, the Plan must be joined as a party, since the Plan ultimately is liable for all payments. Coast should be joined as a necessary party to the suit as the Plan's representative.

C. PREMATURITY

The instant law suit was prematurely filed. Pursuant to the terms of the ERISA Plan, as set forth in the Plan Summary, (Exhibit D, p. 15; Exhibit E, p. 26; Exhibit F, p. 15), if the plaintiffs believe their claims were improperly denied, they should have filed an appeal with the ERISA review department of Blue Cross and Blue Shield of Louisiana within sixty (60) days after the Plan mailed a written notice of denial of the claim. The plaintiffs have failed to file such an appeal. The suit is therefor premature until the plaintiffs exhaust their administrative rem-

edies under the ERISA Plan. "It is well established that the failure to pursue and exhaust administrative remedies precludes judicial relief." Taylor v. South Central Bell, 422 So.2d 528, 529 (La. App. 5th Cir. 1982), citing Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) and Steeg v. Lawyer's Title Insurance Corporation, 329 So.2d 719 (La. 1976); see also Zipf v. American Telephone and Telegraph Co., 799 F.2d 889, 892 (3rd. Cir. 1986).

Further, plaintiffs have made claims for "future medical expenses." Such medical expenses do not currently exist, and such expenses would not automatically be payable by Blue Cross, even if plaintiffs were successful on their other claims raised in the Petition and Amended Petition. Future claims would have to meet the other requirements of the Contract. A determination of whether those claims meet the Contract's requirements must be made by Blue Cross as Claims Administrator. Denton v. First National Bank of Waco, Texas, 765 F.2d 1295, 1304 (5th Cir. 1983); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985); In Berry, the court noted that administrative responsibility rests with those whose experience is daily and continual, and not with judges whose exposure is episodic and occasional. Berry, 761 F.2d at 1006.

IV.

DECLINATORY EXCEPTION

A. LACK OF SUBJECT MATTER JURISDICTION

This case is a claim for benefits under an ERISA Plan. The federal courts have original jurisdiction over suits involving claims for benefits under ERISA. 29 U.S.C. §1132(f). Pursuant to 28 U.S.C. §1441(a), Blue Cross properly and timely removed the suit to the United States District Court for the Eastern District

of Louisiana. The federal district court improperly remanded the case under 28 U.S.C. §1447(c) which order was not reviewable, by appeal or otherwise, by the United States Court of Appeals of the Fifth Circuit. 28 U.S.C. §1447(d). This court lacks subject matter jurisdiction because the case properly removed by defendant and defendant is entitled to a federal forum pursuant to 28 U.S.C. §1441(a). Once this case left this court and was properly removed to the federal district court, the state court lost subject matter jurisdiction over the case. A federal court with jurisdiction over the case may not choose in its discretion to remand the case to state court. Since the federal district court had jurisdiction over the plaintiffs' ERISA claims the court's remand of the case was improper and this court does not have jurisdiction over the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served on all counsel of record by hand or by placing same in the United States Mail, postage prepaid and properly addressed, this __ day of January, 1989.

s/Sylvan J. Steinberg

APPENDIX I

CLAIMS REVIEW AND APPEALS

If your claim is denied in whole or in part, Blue Cross and Blue Shield of Louisiana will explain within a reasonable time in writing why benefits were denied. If you believe that a claim has been incorrectly denied and you want to appeal the denial of benefits, you will receive a full and fair review. If you, or your legal representative, want to appeal the denial of benefits, you must notify Blue Cross and Blue Shield of Louisiana, ERISA Review Department (Customer Service Center), P. O. Box 15699, Baton Rouge, LA 70895. After appeal notice has been received, you or your duly authorized representative may, upon written request, review pertinent non-confidential documents relating to the claim's denial and you may submit issues and comments in writing. In your request for a review, please state the reason you think your claims should not have been denied and include any other documents, dates, information or comments that you feel have a bearing on the claim. You must file an appeal as mentioned in this section within 60 days after the Plan has mailed you written notice of denial of your claim to your last known address. A decision on your claims appeal will be made promptly and no later than 60 days after receipt of your appeal notice. In unusual cases, such as those which require review of technical records by medical specialists, the review may take longer than 60 days. The decision on your appeal will include specific reasons for the decision with specific references to the Plan's provision on which the decision is based.

APPENDIX J

RULE IX. REHEARINGS

. . .

Section 6. An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, or when the judgment of this court is merely overruling a motion to dismiss an appeal or a motion to recall or rescind a rule nisi, or when, for any reason, the judgment has not finally disposed of the case in this court, or when an election case has been decided as provided by Rule X, Section 5(c).

APPENDIX K

SUPREME COURT OF LOUISIANA

NO. 95 C 3025

JANETTE M. wife of/and CHARLIE KORNMAN, INDIVIDUALLY AND ON BEHALF OF THEIR DEPENDENT SON, RICHARD JAY KORNMAN

VERSUS

BLUE CROSS/BLUE SHIELD OF LOUISIANA

ON APPLICATION FOR WRIT OF CERTIORARI, REMEDIALWRIT OR WRIT OF REVIEW OF THE JUDGMENT OF THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA IN NO. 94-CA-306

ORIGINAL APPLICATION FOR WRIT OF CERTIORARI, REMEDIAL WRIT OR WRIT OF REVIEW ON BEHALF OF LOUISIANA HEALTH SERVICE AND INDEMNITY COMPANY (BLUE CROSS/BLUE SHIELD OF LOUISIANA)

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* * *

STATEMENT OF REASONS FOR GRANTING WRIT UNDER RULE X, SECTION 1 (a)

1. The decision of the Court of Appeal, Fifth Circuit, conflicts with decisions of the Court of Appeal, First Circuit, State of Louisiana, and the Court of Appeal, Third Circuit, State of Louisiana, in the cases of Cramer v. Association Life Insurance Company, 563 So.2d 267 (La. App. 1st Cir. 1990) and West v. Connecticut General Life Insurance Company, 591 So.2d 1296 (La. App. 3rd Cir. 1991) as to whether an employer established medical expense plan for employees is an ERISA (Employee Retirement Income Security Act) plan. [The Supreme Court of Louisiana did not reverse the First Circuit finding and holding in Cramer, supra that the medical expense plan established by an employer for its employees was a medical expense plan as defined by the Employee Retirement Income Security Act (ERISA). Cramer v. Association Life Insurance Company, 569 So.2d 533 (La. 1990), cert. denied, 499 U.S. 938 (1991).]

The decision of the Court of Appeal, Fifth Circuit, State of Louisiana, also conflicts with decisions of the United States Court of Appeal, Fifth Circuit, in the cases of Memorial Hospital Sys. v. Northbrook Life Ins. Co., 904 F2d 236 (5th Cir. 1990) and Rodriguez v. Pacificare of Texas, Inc., 980 F2d 1014 (5th Cir. 1993). It is submitted that writs should be granted to secure uniformity of jurisprudence.

2. The Court of Appeal, Fifth Circuit, has decided significant questions and issues of law, which have not been, but should be, resolved by this Court. The Court of Appeal, Fifth Circuit, has, in error, interpreted and decided as a matter of law that a medical expense plan established by an employer for its employ-

ees is not an ERISA plan. The Court of Appeal, Fifth Circuit, has, in error, interpreted and decided as a matter of law that La. R.S. 22:215 A(1)(a) precludes a group health insurer from requiring a dependent of an individual employee to complete an application form and questionnaire and answer health questions before being insured. Further, the Court of Appeal, Fifth Circuit, has, in error, decided as a matter of law, what is meant by the term "self-support". The decisions of the Court of Appeal, Fifth Circuit, State of Louisiana, in these respects will have widespread impact on the health insurance industry and on participants and beneficiaries of employer established medical expense plans for employees.

3. The Court of Appeal, Fifth Circuit, has erroneously applied and interpreted the law as set forth in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, et seq.; LA. R.S. 22:215 A(1)(a), LA. R.S. 22:657, the term "self-support", and the word "Individual" as used in La.R.S. 22:215 A(1)(a), all of which will cause confusion, material injustice and significantly affect the public interest.

* * *

ASSIGNMENT OF ERRORS

1. The Court of Appeal, Fifth Circuit, erred in holding that the medical expense plan ("Coast MEP") established by the employer, Coast Quality Construction Company ("Coast") for its employees was not an employee medical expense plan as defined by the Employee Retirement Income Security Act (ERISA).

2. The Court of Appeal, Fifth Circuit, erred in not addressing or considering the other ERISA issues in this matter including the preemption by ERISA of the state law claims made by the

plaintiffs, whether the Coast MEP is an indispensable party in this suit, whether the plaintiffs' suit is premature for failure to exhaust administrative remedies.

* * *

SUMMARY OF ARGUMENT

1.

Coast Quality Construction Company ("Coast") established a medical expense plan ("Coast MEP") for all of its employees. Coast determined that it would get Louisiana Health Service and Indemnity Co. (Blue Cross/Blue Shield of Louisiana) ("Blue Cross") to insure the Coast MEP. Charlie Kornman, who was only one of the many Coast employees, became a participant in the Coast MEP with the other employees. Initially, Charlie Kornman did not attempt to enroll Richard Kornman in the Coast MEP as his dependent. However, later he attempted to enroll and qualify Richard Kornman as his dependent under the plan. He did so my completing and signing a Group Change of Status form ("application") that contained questions relative to Richard's health. See Appendix Exhibit G.

The medical expense plan established by Coast for its employees ("Coast MEP") is an "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1002(1). Coast owned, controlled, administered and/or assumed responsibility for the Coast MEP and the Blue Cross policy that insured it. Among other things, Coast chose to provide health benefits for its employees and arranged for the plan, Coast chose the medical coverage the plan would provide to its employees and what coverages the Blue Cross policy, which insured the Coast MEP, would provide. Coast paid a percentage of each employee's premium due Blue Cross, Coast

deducted the remaining percentage due for premium from each employees' pay check through payroll deductions, Coast controlled and administered all funds deducted from employees' pay checks, Coast assumed responsibility for submitting the premium payments to Blue Cross each month and Coast assumed responsibility for the balance of any premiums due. Plaintiffs do not dispute any of these facts.

The Coast MEP for its employees clearly qualifies as an ERISA plan under 29 U.S.C. §1002(1) since it was a program established by Coast for the purpose of providing medical, surgical or hospital benefits in the event of sickness or accident to the employees of Coast. Additionally, the Coast MEP is an ERISA plan in light of recent decisions by the Court of Appeal, First Circuit, State of Louisiana, in the case of Cramer v. Association Life Insurance Company, 563 So.2d 267 (La. App. 1st Cir. 1990) and by the Court of Appeal, Third Circuit, in the case of West v. Connecticut General Life Insurance Company, 591 So.2d 1296 (La. App. 3rd Cir. 1991). In holding that the MEP established by Coast for its employees is not an employee medical expense plan as defined by ERISA the Court of Appeal, Fifth Circuit, is in conflict with these cases decided by the Courts of Appeal in the First and Third Circuits. In addition, in so holding, the Court of Appeal, Fifth Circuit, is in conflict with recent decisions by the United States Court of Appeal, Fifth Circuit in the cases of Memorial Hospital Systems v. Northbrook Life Insurance Co., 904 F2d 236, 242-43 (5th Cir. 1990); and Rodriguez v. Pacificare of Texas, Inc., 980 F2d 1014, 1016-17, N.2 (5th Cir. 1993). This conflict between the Court of Appeal, Fifth Circuit, State of Louisiana, in this matter and the Courts of Appeal, First Circuit and Third Circuit, State of Louisiana in the Cramer case, supra and West case, supra will cause great confusion as to whether a medical expense plan established by an employer for its employees is an ERISA plan. Furthermore, the conflict between the Court of Appeal, Fifth Circuit, State of

Louisiana, and the United States Court of Appeal, Fifth Circuit will cause even greater confusion. Medical expense plans established by employers for their employees with the same set of facts as this case, the Kornman case, litigated in the federal courts will be held to be ERISA medical expense plans. Whereas, medical expense plans established by employers for their employees with the same facts as in this case, the Kornman case, litigated in Louisiana courts will be held not to be ERISA medical expense plans. Employers, as well as employees in this State will not know whether they have or are participants in ERISA medical expense plans. There will not be uniformity of jurisprudence.

It is counsel's understanding that the United States Department of Labor will not join in a writ application to any court unless asked to do so by the court in question. However, it is counsel's further understanding that the position of the United States Department of Labor on the issue of whether ERISA would apply in a fact situation as found in this case, the Kornman case, would be opposite to the holding and decision of the State of Louisiana, Court of Appeal for the Fifth Circuit, i.e., the United States Department of Labor would take the position that the Coast MEP was an ERISA plan.

2.

As submitted and argued in this Application for Writs, the Coast MEP for its employees is an ERISA medical expense plan. Since ERISA is applicable state law claims and other claims made by plaintiffs in these proceedings based on the Louisiana Revised Statutes are preempted by ERISA including plaintiffs' claims for penalties and attorneys' fees pursuant to La. R.S. 22:657. 29 U.S.C. §1132. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.RD. 2d 39, 51 (1987); Cramer v. Association Life Insurance Co., 569 So.2d 533

(LA 1990), cert. denied 499 U.S. 938 (1991); Tingle v. Pacific Mutual Insurance Co., 996 F 2d 105, 109-110 (5th Cir. 1993); West v. Connecticut General Life Insurance Co., 591 So.2d 1296 (La. App. 3rd Cir. 1991); Taylor v. Blue Cross/Blue Shield of New York, 684 F. Supp. 1352, 1317-59 (E. D. La. 1988). Further, since the Coast MEP was an ERISA plan, the plan itself is an indispensable party in this matter. 29 U.S.C. §1132. In addition, since the plaintiffs are seeking to recover benefits allegedly due to them under an ERISA plan, the proper defendant is the plan (in this case the Coast MEP) which must be sued as an independent entity pursuant to 29 U.S.C. §1132(d)(1). Further, the plaintiffs suit is premature. Pursuant to the terms of the Coast MEP if the plaintiffs' believed that their claim was improperly denied they should have filed an appeal with the ERISA Review Department of Blue Cross. Plaintiffs never filed an appeal. Therefore, this suit is premature. Rodriguez v. Pacificare of Texas, Inc., 980 F2d 1014, 1016-17 (5th Cir. 1990); Denton v. First National Bank, 765 F2d 1295, 1300-03 (5th Cir. 1985); Taylor v. South Central Bell, 422 So.2d 528, 29 (La. App. 5th Cir. 1980), citing Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980).

* * *

ARGUMENT

I. THE MEDICAL EXPENSE PLAN UNDER WHICH, PLAINTIFFS, THE KORNMANS, CLAIM ENTITLEMENT TO BENEFITS IS AN ERISA PLAN

Coast established a medical expense plan insured by Blue Cross for its employees. ("Coast MEP") Coast arranged for the plan, chose the coverage the plan would provide to its employees, chose to insure the plan, selected Blue Cross to insure the plan. Further, Coast paid a percentage of each employee's premium and deducted the remaining percentage from each employee's paycheck through payroll deductions. Additionally,

Coast controlled and administered all funds deducted from employee's paychecks, assumed responsibility for any balance due Blue Cross for premiums and administered all funds deducted from employees' paychecks. All of this evidence and these facts were brought out at the trial of this matter. Testimony of D. Epstein, an executive of the employer, Coast Quality Construction Company, Tr. at pp. 987-89, Testimony of M. Echlin, Tr. at p. 1730. Charlie Kornman, an employee of Coast, enrolled himself in the Coast MEP as an employee of Coast and enrolled his wife in the Coast MEP as his dependent. Blue Cross Exhibit "2" in the record. Initially Charlie Kornman did not attempt to enroll Richard Kornman as a dependent. Testimony of J. Kornman, Transcript at pp. 1982-83; Testimony of D. Epstein, Transcript at pp. 942-944, 1014. Later he attempted to qualify Richard Kornman as his dependent in the Coast MEP. Blue Cross Exhibit "3" in the record. See Appendix Exhibit G.

The medical expense plan established by Coast for its employees ("Coast MEP") under which plaintiffs claim they are entitled to benefits is, in reality, an "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1002(1). An ERISA plan is defined as:

> any plan, fund or program . . . established by an employer or employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of the insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

See, 29 U.S.C. §1002(1). The Coast MEP clearly qualifies as an ERISA plan under the language of the statute, because it is a

program established by Coast for the purpose of providing medical, surgical or hospital benefits in the event of sickness or accident to the employees of Coast. Additionally, the Coast plan qualifies as an ERISA plan pursuant to the decision of the Court of Appeal, First Circuit, State of Louisiana, in the case of Cramer v. Association Life Insurance Co., 563 So.2d 267 (La. App. 1st Cir. 1990). In the Cramer case, the Court of Appeal, First Circuit, found the facts to be:

> *The record shows that Mr. Cramer's employer, ABC, through its president, Charles Cramer, Sr., made an application for group life, health, and medical insurance with ALIC. The group insurance application by ABC was approved by ALIC and became effective on August 1, 1985. Charles Cramer, Jr., an employee of ABC, together with his wife and minor daughter were covered under the group policy, as were other employees of ABC, their spouses, and their dependents. According to ABC's application, ABC contributed 50% of the cost of the employee benefits.*
>
> *Under the factors set forth in Donovan, we find that ABC established an employee benefit plan for the purpose of purchasing insurance. The extended benefits were provided to the employees of ABC, their spouses, and their dependents. Fifty percent of the insurance premiums were paid by ABC, and ABC, not the individual employees, maintained the plan.*
>
> *Accordingly, we find that the ABC plan is an employee welfare benefit plan within the contemplation of ERISA and that the trial court erred*

> *in finding to the contrary.* See Cramer v. Association Life Insurance Co., 563 So.2d 267, at p. 272 (La. App. 1st Cir. 1990).

See also Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982).

The facts in the Cramer case are very similar, if not the same as those in the instant case. ABC, as did Coast, made an application for medical insurance to cover its medical expense plan for its employees. The employees of ABC were covered under the insurance as were the employees of Coast. ABC, as did Coast, contributed to the cost of premiums, and ABC, as did Coast, paid the balance of premiums to maintain the insurance and plan. Accordingly, the ABC plan, as found by the Court of Appeal, First Circuit, was an ERISA plan just as the Coast MEP should be found to be an ERISA plan. Further, the Coast MEP is an ERISA plan pursuant to the decision of the Court of Appeal, Third Circuit, State of Louisiana, in the case of West v. Connecticut General Life Insurance Company, 591 So.2d 1296 (La. App. 3rd Cir. 1991).

Additionally, the Coast MEP qualifies as an ERISA plan in light of recent decisions by the United States Court of Appeal, Fifth Circuit as to what constitutes an ERISA plan.

The United States Court of Appeal, Fifth Circuit, has found that the employer's involvement in the plan determines whether a plan meets the requirements to establish an ERISA welfare benefit plan. See, Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 242-43 (5th Cir. 1990); Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1016-17, n.2 (5th Cir. 1993).

In Rodriguez, the employees contributed, through pay-

roll deductions, a portion of the insurance premiums; the employer paid the balance. The Fifth Circuit specifically held in Rodriguez that such an arrangement and involvement by the employer established an ERISA plan. Rodriguez, 980 F.2d at 1017, n.2. Likewise, a similar arrangement by the employer was found sufficient in the Memorial Hospital case to establish an ERISA plan. Memorial Hospital, 904 F.2d at 242-43.

The Coast plan is exactly the same situation that occurred in Rodriguez and Memorial Hospital. The Coast employees contributed, through payroll deductions, a portion of the insurance premiums; Coast paid the balance. Testimony of D. Epstein, an executive of Coast, Transcript at pp. 987-89. The U.S. Fifth Circuit has specifically held that such a plan qualifies as an ERISA medical expense plan. The trial court and Court of Appeal, Fifth Circuit, were therefore, incorrect in holding that the Coast MEP for its employees was not an ERISA plan.

The trial court and the Court of Appeal, Fifth Circuit, rely on the case of Taggart Corp. v. Life & Health Benefits Administration, Inc., 617 F.2d 1208 (5th Cir. 1980), cert. denied 450 U.S. 1030 (1981) in holding that the Coast MEP in this case does not qualify as an ERISA plan. Taggart is not the United States Court of Appeal, Fifth Circuit, seminal decision on this issue. Taggart is an early Fifth Circuit decision which has since been qualified in more recent U.S. Fifth Circuit decisions. See Rodriguez, 980 F.2d 1014 (5th Cir. 1990) and Memorial Hosp., 904 F.2d 236 (5th Cir. 1990).

The U. S. Fifth Circuit in Memorial Hospital, specifically distinguished Taggart from a situation involving similar facts to those at issue in this case. Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 242-43 (5th Cir. 1990).

(1) Unlike the Taggart case where there was only one employee, Charlie Kornman was not the only employee of Coast and not the only employee of Coast enrolled in the medical expense plan as was the case in Taggart. Coast had a large number, if not all, of its other employees in addition to Charlie Kornman enrolled in its medical expense plan;

(2) Unlike the Taggart case, this case does not involve the bare purchase of insurance. Coast, and not a trust entity as in Taggart, was much more involved with the medical expense plan as follows:

(3) Coast chose to provide health benefits for its employees and arranged for the plan;

(4) Coast chose the coverage the plan and its insurer would provide to its employees;

(5) Coast paid a percentage of each employee's premium;

(6) Coast deducted the remaining percentage from each employee's paycheck through payroll deductions;

(7) Coast controlled and administered all funds deducted from employee's paychecks;

(8) Coast assumed responsibility for submitting the premium payments to Blue Cross each month.

All of this evidence and these facts were brought out

during the trial of this matter in the 24th Judicial District Court. Testimony of D. Epstein, an executive of Coast, Tr. at pp. 987-89, Testimony of M. Echlin, Tr. at p. 1730.

The U. S. Fifth Circuit has found that such an arrangement sufficiently establishes the necessary employer relationship needed to constitute an ERISA plan. Memorial Hosp. Sys. v. Northbrook Life Ins. Co., supra., Rodriguez v. Pacificare of Texas, Inc., supra. The State of Louisiana, Courts of Appeal for the First and Third Circuits have also found that with this employer involvement an ERISA plan is established. Cramer v. Association Life Insurance Company, 563 So.2d 267 (La. App. 1st Cir. 1990) and West v. Connecticut General Life Insurance Co., 591 So.2d 1296 (La. App. 3rd Cir. 1991).

Thus, it is submitted that the decision by the trial court and Court of Appeal, Fifth Circuit, that the Taggart case should be followed to find the Coast MEP is not an ERISA plan is in error. Taggart is only applicable to cases with similar fact situations. This case with the Kornmans and the Coast MEP is not such a case. Clearly, the facts in the instant case are directly at odds with the facts in the Taggart case.

As previously set forth herein in the Statement of Reasons for Writ under Rule X, Section 1(a) and Summary of the Argument, the decision of the trial court and Court of Appeal, Fifth Circuit, conflicts with decisions of the Court of Appeal, First Circuit, State of Louisiana, and the Court of Appeal, Third Circuit, State of Louisiana, in the cases of Cramer v. Association Life Insurance Company, 563 So.2d 267 (La. App. 1st Cir. 1990) and West v. Connecticut General Life Insurance Company, 591 So.2d 1296 (La. App. 3rd Cir. 1991) as to whether an employer established medical expense plan for employees is an ERISA (Employee Retirement Income Security Act) plan. [The Supreme Court of Louisiana did not reverse the First Circuit finding

and holding in Cramer, supra that the medical expense plan established by an employer for its employees was a medical expense plan as defined by the Employee Retirement Income Security Act (ERISA). Cramer V. Association Life Insurance Company, 569 So.2d 533 (La. 1990), cert. denied, 499 U.S. 938 (1991).]

The decision of the Court of Appeal, Fifth Circuit, State of Louisiana, also conflicts with decisions of the United States Court of Appeal, Fifth Circuit, in the cases of Memorial Hospital Sys. v. Northbrook Life Ins. Co., 904 F2d 236 (5th Cir. 1990) and Rodriguez v. Pacificare of Texas, Inc., 980 F2d 1014 (5th Cir. 1993). It is submitted that writs should be granted to secure uniformity of jurisprudence.

This conflict between the Court of Appeal, Fifth Circuit, of this state in this matter and the Court of Appeal, First Circuit, and Court of Appeal, Third Circuit, in the Cramer case, supra and West case, supra will cause great confusion and lack of uniformity as to whether a medical expense plan established by an employer for its employees is an ERISA plan. Furthermore, the conflict between the Court of Appeal, Fifth Circuit, State of Louisiana, and the United States Court of Appeal, Fifth Circuit will cause even greater confusion and lack of uniformity. Medical expense plans established by employers for their employees with the same set of facts as this case, the Kornman case, litigated in the federal courts will be held to be ERISA medical expense plans. Whereas, medical expense plans established by employers for their employees with the same facts as in this case, the Kornman case, litigated in Louisiana courts will be held not to be ERISA medical expense plans. Employers, as well as employees in this State will not know whether they have or are participants in ERISA medical expense plans.

It is counsel's understanding that the United States De-

partment of Labor will not join in a writ application to any court unless asked to do so by the court in question. However, it is counsel's further understanding that the position of the United States Department of Labor on the issue of whether ERISA would apply in a fact situation as found in this case, the Kornman case, would be opposite to the holding and decision of the State of Louisiana, Court of Appeal for the Fifth Circuit, i.e., the United States Department of Labor would take the position that the Coast MEP was an ERISA plan.

II. THE MEDICAL EXPENSE PLAN ESTABLISHED BY COAST IS AN INDISPENSABLE PARTY, PLAINTIFFS' LAWSUIT IS PREMATURE, AND PLAINTIFFS' STATE LAW CLAIMS ARE PREEMPTED

A. Indispensable Party

The trial court and the Court of Appeal, Fifth Circuit, erred in not addressing or considering and holding that the ERISA medical expense plan established by Coast for its employees ("Coast MEP") is an indispensable party. The civil enforcement provisions of ERISA are contained in 29 U.S.C. §1132. Section 1132(d) makes clear that an ERISA plan "may sue or be sued . . . as an entity." The statute goes on to state: "Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability is established in his individual capacity under this subchapter." 29 U.S.C. §1132(d)(2). Where plaintiffs are seeking to recover benefits allegedly due to them under the terms of an ERISA plan, the proper defendant is the plan, which may be sued as an independent entity pursuant to 29 U.S.C. §1132(d)(1). Jourdan v. Claims, Inc., 1992 U.S. Dist. LEXIS 2157 (W.D. Mich. 1992); Jenkinson v. Chevron Corp., 634

F.Supp. 375, 377 (N.D. Cal. 1986). Therefore, the ERISA plan established by Coast (the "Coast MEP") is an indispensable party to the suit filed by plaintiffs, and thus, this matter should be dismissed for plaintiffs failure to join the ERISA plan established by Coast ("Coast MEP") as a proper party defendant.

B. Plaintiffs' Lawsuit is Premature

The trial court and the Court of Appeal, Fifth Circuit, erred in not addressing or considering and holding that the plaintiffs' lawsuit was prematurely filed.

Pursuant to the terms of the ERISA plan established by Coast ("Coast MEP"), as set forth in the plan summary, if the plaintiffs believe that their claim was improperly denied, they should have filed an appeal with the ERISA review department of Blue Cross within sixty days after the plan mailed a written notice of denial of the claim. This procedure is fully set forth in the Plan Summary for 1984, Plaintiffs Exhibit "3" in the record, p. 15, Employee Booklet; Plan Summary for 1985, Plaintiffs Exhibit "4" in the record, p. 26, Employee Booklet; Plan Summary for 1987, Plaintiffs Exhibit "6" in the record, p. 15, Employee Booklet. See Appendix Exhibit E. The plaintiffs never filed such an appeal. Their suit is, therefore, premature and should be dismissed since the plaintiffs failed to exhaust their administrative remedies under the ERISA plan.

The U.S. Fifth Circuit Court of Appeals has recently reaffirmed its holding that a failure to exhaust the administrative remedies provided for in an ERISA plan forecloses judicial review of the claim denial. Rodriguez, 980 F.2d at 1016 n.1. See also, Denton v. First Nat'l Bank, 765 F.2d 1295, 1300-03 (5th Cir. 1985); Taylor v. South Central Bell, 422 So.2d 528, 29 (La. App. 5th Cir. 1982), citing, Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980); Steeg v. Lawyer's Title Insurance Corp., 329 So.2d

719 (La. 1976) ("It is well established that the failure to pursue and exhaust administrative remedies precludes judicial relief.") As one court has noted, administrative responsibility rests with those whose experience is daily continual, and not with judges whose exposure is episodic and occasional. Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985).

In this case, the plaintiffs failed to exhaust their administrative remedies before filing suit in state court. Such a failure to exhaust administrative remedies provided for in the ERISA plan forecloses judicial review of the claim denial. Rodriguez, 980 F.2d at 1016 n.1. As stated by the U.S. Fifth Circuit, Court of Appeal, in enacting ERISA, Congress clearly wanted potential plaintiffs to first exhaust their administrative remedies before resorting to the courts. Denton, 765 F.2d 1303.

C. Plaintiffs' State Law Claims are Preempted

The trial court and the Court of Appeal, Fifth Circuit, erred in not addressing or considering and holding that the plaintiffs' state law claims were preempted by ERISA. Plaintiffs' sole basis for recovery is alleged violations of state law and certain Louisiana Revised Statutes. Plaintiffs also contend that they are entitled to penalties and attorneys fees pursuant to La.R.S. 22:657. This statute is completely preempted by ERISA's civil enforcement provision, 29 U.S.C. §1132. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed. 2d, 39, 51 (1987). In Pilot Life, the Supreme Court held that the civil enforcement provisions of ERISA were intended by Congress to be the "exclusive vehicle for action by ERISA-plan participants and beneficiaries asserting improper processing of claims for benefits, and that the varying state causes of action for claims within the scope of [section] 1132 would pose an obstacle to the purposes and objectives of Congress." Pilot Life, 95 L.Ed.2d at 50-51. The Supreme Court quoted Massachusetts Life Ins. Co.

v. Russell, 473 U.S. 134, 146, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).

La.R.S. 22:657 clearly provides a remedy to participants and beneficiaries claiming benefits which was not intended nor provided by 29 U.S.C. §1132. ERISA contains no provision for punitive damages. Russell, 473 U.S. at 144. Therefore, both Louisiana state courts and federal courts have been uniform in holding that ERISA preempts La.R.S. 22:657. Cramer v. Association Life Ins. Co., 569 So.2d 533 (La. 1990), cert. den'd, 499 U.S. 938 (1991). See also, Tingle v. Pacific Mut. Ins. Co., 996 F.2d 105, 109-110 (5th Cir. 1993); West v. Connecticut General Life Ins. Co., 591 So.2d 1296 (La. App. 3d Cir. 1991); Taylor v. Biue Cross/Blue Shield of New York, 684 F. Supp. 1352, 1356-59 (E.D. La. 1988). Moreover, preemption applies not only to self-funded ERISA plans, but to insured plans as well. The United States Supreme Court specifically held in Pilot Life, supra that ERISA's preemption provisions apply in the context of an insured employee benefit plan. Pilot Life, 95 L.Ed.2d at 45 and 51-52. See also, Cramer, 569 So.2d at 533 (Louisiana Supreme Court likewise applied ERISA's preemption provisions to an insured plan).

The trial court and the Court of Appeal, Fifth Circuit, were in error in holding that ERISA would only preempt La.R.S. 22:657 and would not affect the other insurance laws relied upon by plaintiffs. Other statutes relied upon by the plaintiffs in this case are also preempted. Using the preemption analysis, courts have found that ERISA preempts La.R.S. 22:619(B), another statute relied upon by the plaintiffs. Tingle v. Pacific Mut. Ins. Co., 996 F.2d 105 (5th Cir. 1993). It is submitted that La.R.S. 22:215A(1)(a) is preempted by ERISA. Additionally, the Fifth Circuit noted that other courts have held that the case law holding that ambiguous terms in an insurance contract are to be construed against the insurer is also preempted by ERISA. Tingle, 996 F.2d

at 110 n.25, citing, McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426, 428-30 (6th 1989). The court applied the three part test and found that the law did not spread policy holder's risk but, instead forces the insurer to bear the legal risk associated with the ambiguous policy language. Id. Additionally, the court noted that the law was not aimed directly at the insurance industry because it derived from state law. Id. See also, Brewer v. Lincoln National Life Ins. Co., 921 F.2d 150 (8th Cir. 1990), cert. den'd, U.S. _, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991) (Missouri law requiring that ambiguities in insurance contracts be construed against insurer is preempted by ERISA).

* * *

CONCLUSION

The Judgment of the Court of Appeal, Fifth Circuit, affirming the Judgment of the 24th Judicial District Court is in error for the many reasons set forth in this Application for Writ of Certiorari, Remedial Writ or Writ of Review.

The Judgment conflicts with decisions and judgments of other courts of appeal of this state and with the United States Court of Appeal for the Fifth Circuit as to what medical expense plans provided by employers for their employees are ERISA plans. Further, there are significant issues of law and interpretations of Louisiana statutes that should be resolved by this Court. In addition, the Judgment of the Court of Appeal, Fifth Circuit, for the reasons set forth in this application, has interpreted statutes, both federal (the Employee Retirement Income Security Act) and State of Louisiana statutes erroneously. Said erroneous interpretations will adversely effect efficient judicial administration, fundamental fairness to litigants, cause serious financial and other devastating consequences, affect the public interest

and also cause material injustice.

Therefore, the applicant, Louisiana Health Service and Indemnity Company (Blue Cross/Blue Shield of Louisiana) prays that this application be deemed sufficient, and that this Court grant its requests for a writ of certiorari, remedial writ or writ of review from the Judgment of the Court of Appeal, Fifth Circuit.

Respectfully submitted,

s/Sylvan J. Steinberg
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VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

SYLVAN J. STEINBERG

who being first duly sworn, did depose and say:

That this Verification is made pursuant to Rule 10, Section 2(d) of the Rules of the Louisiana Supreme Court;

That he is counsel of record for Applicant, Louisiana Health Service and Indemnity Company (Blue Cross/Blue Shield of Louisiana),

That he has read the foregoing Application for Writ of Certiorari, Remedial Writ or Writ of Review of Judgment;

That all of the allegations contained therein are true and correct to the best of his knowledge, information and belief;

That a copy of the Application for Writ of Certiorari, Remedial Writ or Writ of Review of Judgment has this day been filed with the Clerk of Court of the Court of Appeal, Fifth Circuit, and delivered to the Honorable Clarence E. McManus, and to all other counsel of record at the addresses listed below by depositing same in the United States Mail, properly addressed and postage prepaid.

s/Sylvan J. Steinberg
SYLVAN J. STEINBERG

SWORN TO AND SUBSCRIBED
BEFORE ME ON THIS 15th
DAY OF DECEMBER, 1995

s/Fred Bronfin
NOTARY PUBLIC

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